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ALEXANDER L. STEVAS,
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NO. 83-1297

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

VS.

KARL L. DAHLSTROM, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT DAHLSTROM'S BRIEF IN OPPOSITION

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RESPONDENT DAHLSTROM'S BRIEF IN OPPOSITION

One of the respondents, Karl L. Dahlstrom (hereinafter referred to as Dahlstrom) respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Ninth Circuit in the case. That opinion is reported at 713 F.2d 1423. *See also* Government Petition at 1a *et seq.* (hereinafter referred to as Pet. at _____).

STATEMENT

1. OVERVIEW OF THE ALA

The American Law Association (ALA) is a membership organization comprised of several hundred members from approximately thirty-five states. TR. 2962-64. The ALA was originally formed by Dahlstrom to avoid state laws prohibiting the practice of law without a license. TR. 3021. As of the date of trial, the ALA was situated in a 7200 square foot complex in Bryan, Texas. TR. 3285-86. Included therein was a courtroom, a tax law library with over 5000 volumes, and computer research facilities. TR. 3297-98. Among the services offered to ALA members, their attorneys and accountants, were two types of seminars. The first type of seminar was a two day seminar at which four separate subjects were covered: Part I - revocable living trust agreements; Part II - pure trust organizations; Part III - foreign trust organizations; and Part IV - taxpayer's legal defense. TR. 2994, 3025. *See* Govt. Ex. 230. The second type of seminar was an "Attorney/CPA" seminar which involved, typically, questions, answers and the interchange of ideas regarding the four part, two day seminars. TR. 3283-85. This second type of seminar was attended primarily by attorneys and accountants representing ALA members. TR. 3283-85. ALA members also received materials printed

by the ALA such as Govt. Ex. 146 and 230, as well as association newsletters which were designed to keep ALA members current on Supreme Court opinions and congressional legislation. TR. 2983-84. Finally, at various times, the ALA had numerous independent chapters situated in different portions of the United States. TR. 2986-88.

2. SUMMARY OF THE HISTORICAL DEVELOPMENT OF THE ALA

Respondent Dahlstrom is a well educated man having obtained a B.A. and a Masters in Physics and Education. He is also working on a Ph.D. TR. 2856-57. At various times, he has served as an instructor at the university level. TR. 2857. He has, however, no formal training as an attorney and is not licensed thereas. TR. 2882. Prior to trial, he had never before come into contact with the criminal justice system. TR. 2858.

In 1968, Respondent Dahlstrom, while employed as an engineer with Texas Instruments, read Norman Dacey's book "How To Avoid Probate." TR. 2991. Dacey's book was an inspiration to Dahlstrom. TR. 2993. Dahlstrom began doing research on pure trust organizations. TR. 2996-3000. Dahlstrom's research into pure trust organizations generated some newspaper coverage, TR. 3000-03, and in 1973, Dahlstrom gave a seminar in Missouri on pure trust organizations. The seminar focused on how pure trust organizations could be utilized to avoid probate and estate taxes. TR. 3003.

As a result of that seminar, Dahlstrom was permanently enjoined by the State of Missouri on April 17, 1974, from misrepresentation in connection with the advertisement of services he offered in the establishment of pure trusts. TR. 2822-24; 3003-13. Govt. Ex. 62. In connection with the injunctive action, all of Dahlstrom's financial records and tax returns, including those of certain business trusts he had previously es-

tablished, were subpoenaed by the State of Missouri. TR. 3013-14.

Shortly thereafter, Dahlstrom formed the ALA. TR. 3021. The ALA was formed due to the problems Norman Dacey had encountered in New York [including *criminal* contempt, *cf. Dacey v New York County Lawyer's Association*, 423 F.2d 188 (2nd Cir. 1969)] and the problems Dahlstrom had encountered in Missouri. TR. 2990-3027.[1]

Originally, the ALA program was comprised of two portions: (1) revocable living trust agreements; and (2) pure trust organizations. TR. 3027. *See* Govt. Ex. 146, 230. Later, however, based on, *inter alia:* (1) Dahlstrom's personal encounters with the IRS; (2) Dahlstrom's independent research into the Privacy Act, 5 U.S.C. §552a, the Freedom of Information Act (FOIA), 5 U.S.C. §552, and the Fifth and Sixth Amendments to the Constitution of the United States; and (3) information Dahlstrom obtained via the FOIA, Dahlstrom formulated an additional portion of the two day ALA seminars: taxpayer's legal defense. TR. 3112, 3117, 3151, 3159, 3166. Similarly, based on Dahlstrom's research into pure trust organizations, he originated an additional portion of the two day ALA seminars: Foreign trust organizations (FTO's). TR. 3210-22.

Dahlstrom's advocacy was not limited to ALA members. For instance, in May 1976, he presented a speech to the Indiana Medical Association on "judgement proofing" of estates. TR. 2867. *See also* TR. 2859, 2870-76.

Eventually, the IRS learned of Dahlstrom's advocacy and of the ALA program in general. Apparently due to a belief that Dahlstrom was advocating the creation of

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[1]Dahlstrom wrote a similar type book, entitled "How To Avoid Probate, Gift, Inheritance and Estate Taxes", in early 1974. TR. 2858.

family trusts,[2] TR. 3037, the IRS attempted to obtain the names of ALA members. The IRS attempted to obtain the names of ALA members by issuing a tax deficiency against Dahlstrom in connection with his personal use of business trust organizations. TR. 3029-3111. In connection with that deficiency, three summon enforcement actions were conducted. TR. 3029-3111. In each proceeding, however, Federal District Judges entered appropriate orders which protected the names of ALA members [based on the First Amendment]. TR. 3037, 3044, 3108, 3110. Also, the deficiency assessed against Dahlstrom by the IRS in connection with his personal use of business trusts was eventually dropped by the IRS. TR. 3103-04, 3587-93.

In early 1978, the IRS became aware of the precise nature of the seminars Dahlstrom conducted. TR. 2254-59, 2390-91. An undercover investigation was instigated in late 1978. TR. 1343, 1388-89, 1391-95, 2267-68. However, it was not until August 1979 that the IRS drafted and distributed to the public and the bar a position paper regarding FTO's. TR. 2448-85. Dahlstrom did receive a copy of that position paper. Govt. Ex. 267. Dahlstrom voiced his disagreement with the IRS position paper. TR. 2469-74, 2482-84. The dispute, simply stated, centered upon the issue of whether the legal form or the economic substance controlled in determining the tax consequences of FTO's. The IRS position was that substance always prevailed, regardless of the legal form employed. Based on Supreme Court opinions and other materials, Dahlstrom asserted that

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[2]Dahlstrom learned of this from materials he obtained from the IRS pursuant to his utilization of the FOIA. TR. 3027-3110. Dahlstrom also learned from those materials that someone had labeled him a "tax protestor". TR. 3039-42. Due to Dahlstrom's belief that the label "tax protestor" was incorrect and that someone had supplied false information to the IRS, Dahlstrom filed a complaint with the F.B.I. TR. 3095-98.

legal form would control except where the IRS code, Congress or the Courts had declared otherwise. TR. 2452-85. Govt. Ex. 262, 267. *See also* Def. Ex. G-X.

Dahlstrom inserted the IRS position paper and his sixteen page response thereto into the ALA seminar materials, distributed copies of both items to ALA members, and continued his advocacy of the two day, four part ALA program. TR. 3216-32. Dahlstrom was subsequently indicted in June 1981 for events allegedly occurring between 1976 and January 1980. CR. 1.

3. ADDITIONAL MATTERS RELEVANT TO THE GOVERNMENT'S "STATEMENT"

a. Generally

At trial, the Government's proof focused upon part III (FTO's) and part IV (taxpayer's loyal defense) of the ALA program. The Government took the position at trial that but for Dahlstrom's advocacy of FTO's, none of those individuals or corporations would have created FTO's and claimed deductions incident to the creation and utilization of those FTO's.

With regard to the FTO's, the Government's position at trial was that substance always controls over form, that Dahlstrom was well aware of that absolute rule of law, that Dahlstom's position regarding FTO's depended on form controlling over substance, and thus Dahlstom knew that he was advocating a sham (since the Government asserted that substance *always* controlled over form).

However, due to the dispute between Dahlstrom and the IRS in August 1979, the Government knew that Dahlstrom could and would dispute its position on substance versus form, that he would be able to introduce evidence (case law) to support his position, and that the ALA materials contained case law on both sides of the controversy. *See* e.g., Govt. Ex. 230, 262, 267.

Thus, it was necessary for the Government to take the position (which it did at trial) that Dahlstrom's advocacy of the propriety of reliance on the Privacy Act, the Freedom of Information Act and other statutory rights as well as the Fifth and Sixth Amendments revealed his specific intent to violate the tax laws.

b. Specific Responses To Government's Statement

1. The Government asserts that "respondents promoted and sold a 'tax shelter' program in which participants used a series of *sham* transactions . . ." Pet. at 3 (emphasis added). The Government's use of the term "sham" is a legal conclusion. It necessarily assumes a resolution of the underlying substance versus form controversy favorable to the Government; a resolution which was not decided at trial and which the Court of Appeals concluded was undecided with regard to FTO's at least until the IRS position paper was issued in August 1979.[3]

2. The Government asserts that "[t]he transactions, taken as a whole, had no economic substance; their sole purpose and effect was to generate phoney tax deductions for the participants." Pet. at 4. The Government's assertion ignores the trial testimony of the Government's expert witness, Karl Krogue. Although Krogue acknowledged that the FTO's created by Rickets were legal trusts, Krogue also testified that he *assumed* that Rickets' transactions had no business purpose and that given that *assumption*, the transactions had no substance for tax purposes. TR. 2513-14, 2574, 2596-

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[3]In actuality, the substance versus form argument in the context of FTO's has still not been decided. *Zmuda* v *Commissioner*, 79 T.C. No. 714 (1982), appeal pending, No. 83-7374 (9th Cir. filed May 23, 1983), addressed the issue of whether Zmuda's FTO's had a business purpose and whether the claimed deductions were valid. Thus, *Zmuda* supports the position that the tax treatment of FTO's must be determined on a case by case basis.

99.[4] Implicit in Krogue's testimony is the realization that the tax treatment of transactions involving FTO's was and is dependent upon: (1) resolution of the substance versus form controversy; and, (2) the business purpose(s) of the transaction.[5] TR. 2505-09. The testimony of the defensive expert, Michael Pinatelli, expressly supported that realization. TR. 3754-09, 3784-3870, 3889-3954.

As to the former issue, the record is replete with references to the controversy between Dahlstrom and the IRS. Similarly, the record is replete with references that Dahlstrom and the other respondents were constantly seeking additional legal opinions and reasons in support thereof as to the proper resolution of that controversy.[6] Finally, Dahlstrom even informed the ALA membership of the IRS position paper and of his re-

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[4]*Cf.* TR. 1922, 1940-41, where Mr. Howlett testified he established FTO's to place his assets outside the reach of creditors.

[5]Krogue also testified that in his opinion the FTO's would be treated as associations taxable as corporations under 26 U.S.C. §1491. TR. 2595. Thus, ALA members would be taxed on transfers into the FTO's as well as distributions out of the FTO's. Dahlstrom's materials included a discussion of 26 U.S.C. §1491. TR. 2945-46. Def. Ex. B-C. Krogue's testimony on this point was disputed by the defensive expert. TR. 3832-33.

[6]Dahlstrom's testimony at trial regarding his research into the substance versus form controversy tracked, to a certain extent, the materials (i.e., case law) he supplied ALA seminar attendees. *See* TR. 3117-33 and compare with Govt. Ex. 230. *See also* TR. 3256-81, where Dahlstrom elaborated on opinions from this Court which he believed supported his position.

Indeed, Dahlstrom's sixteen page response to the IRS position paper is a remarkable legal memorandum considering it was drafted by a layman. It cites well over fifty opinions from this Court and other courts and sets forth a persuasive argument in support of his position. It also *agreed* with the IRS as to the treatment of family trusts. Even a cursory review of that response reveals Dahlstrom's good faith belief in his position.

sponse to it.

As to the second issue, the record is clear that Dahlstrom did not monitor or even know which ALA members decided to create FTO's, utilized those FTO's for any particular purpose or with any particular business purpose or lack thereof, let alone know those people and/or entities which claimed tax benefits and the extent of those benefits pursuant to the utilization of those FTO's.

Thus, the Government's assertion is not necessarily correct, for the answers to the above two issues are necessary prerequisites to ascertaining the tax effect of transactions including FTO's. Assuming a valid business purpose or assuming resolution of the substance versus form controversy as advocated by Dahlstrom, the transactions involving FTO's would be treated for tax purposes as contemplated by Dahlstrom. Assuming a valid business purpose and even assuming resolution of the substance verse form controversy as espoused by the IRS, the transactions involving FTO's would be treated for tax purposes as contemplated by Dahlstrom. Only in an instance where there was no business purpose *and* the substance versus form controversy was resolved against the position advocated by Dahlstrom would the transactions involving FTO's not receive the tax treatment contemplated by Dahlstrom.[7]

Furthermore, the fact that the tax treatment might or might not ultimately coincide with that contemplated by Dahlstrom does not necessarily reveal specific intent. Indeed, the distinct possibilities set out above regarding the possible tax treatment of FTO's lend cre-

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[7]Even then, a separate inquiry into the validity of the deduction as well as the "gift" or "loan back" would have to be undertaken. In other words, the deduction could be valid, but the "gift" or "loan back" might be income, or the deduction could be disallowed in which case the "gift" or "loan back" would not be income. *Cf.* Pet. at 20-21.

dence to Dahlstrom's testimony at trial that utilization of FTO's was legal and that his position was based in good faith on his research into, *inter alia*, the case law of this Court, the Tax Court, and the Court of Appeals.

3. The Government asserts that "[t]he particular version of this scheme promoted by respondents employed foreign trusts as the vehicle for carrying out the transactions *and reducing the risk of detection* by the Internal Revenue Service." Pet. at 4. (emphasis added). The Government's assertion regarding the reduction of risk of detection is pure speculation unsupported, and in fact contradicted, by the record. Dahlstrom testified that foreign trust organizations were essentially identical to domestic business trust organizations. TR. 3210. According to Dahlstrom, he advocated utilization of FTO's because: (1) FTO's would classify as a foreign entity receiving income from a foreign source and hence not subject to income tax; (2) pursuant to 26 U.S.C. §2501 a gift of intangible property by a nonresident alien (i.e., FTO) to a U.S. citizen is not subject to any gift tax, TR. 3209-49; and, (3) pursuant to 26 U.S.C. §102, a gift of intangible property by a nonresident alien (i.e., FTO) to a U.S. citizen is not subject to any income tax. TR. 3209-49. Accordingly, the Government's effort to imply a motive to conceal is not supported by the record.

Also, the Government has neglected to inform the Court that the materials supplied by Dahlstrom and the trial testimony of ALA members and seminar attendees reflect that Dahlstrom advocated the filing of all necessary tax forms, such as 1040 NR's and 1001's, *cf.* TR. 809, 1126; Govt. Ex. 230 at p. 44, and that Dahlstrom stressed never to do anything fraudulently. TR. 535-36, 3666, 3737-39.

4. The Government asserts that "Dahlstrom or others conducting seminars advised participants to make payments to trust number two for *purported* business

expenses . . . " Pet. at 5. The Government is again ignoring the trial testimony. IRS Agent Perry testified that Dahlstrom gave examples of how trust number two could be utilized. TR. 1390-92. Those examples included: (1) sale and leaseback of equipment to and from trust number two; (2) consulting fees paid to trust number two; (3) sale and leaseback of patent or copyrights to and from trust number two; (4) purchase of supplies from trust number two; and, (5) employment of office personnel who work for trust number two. TR. 1390-92.[8] All of these examples are valid legal transactions which would create valid deductions if they were ordinary and necessary business expenses. 26 U.S.C. §162(a). For instance, the Howlett transaction, "another typical transaction", Pet. at 6, involved a transfer of certain property from Dr. Howlett to his trust number two for purposes of placing his assets outside the reach of potential creditors. TR. 1922, 1940-41. Dr. Howlett thereafter leased back those assets and claimed the lease payments as a business expense. TR. 1906-08.[9] The Government attempts to label these deductions "purported rental payments." Pet. at 6. However, in its motion for rehearing before the Ninth Circuit, the Government conceded that the deductions were not invalid. Govt. Motion For Rehearing at 2 n.2. This posture is inconsistent with the Government's efforts to now characterize the deduction as invalid in the initial instance: clearly the deduction was

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[8]A sixth possible use of trust number two involved a loan and interest charges. TR. 1392. However, Perry's testimony regarding this clearly reveals that he did not understand what Dahlstrom advocated in this regard. TR. 1392.

[9]Prior to 1979, Dr. Howlett had depreciated the property and took a deduction therefor. TR. 1940. Thus, to a certain extent, one type of deduction was substituted for a previous type of deduction (which had terminated in 1979 due to full depreciation of the property. TR. 1940).

valid, although the amount *might* be subject to a reduction.[10]

5. The Government asserts that "respondents also counseled [program participants] to employ various methods for avoiding detection by the IRS." Pet. at 7 (explanation added). However, none of the evidence cited by the Government reflects that *Dahlstrom* was engaged in any such activities. Indeed, the record affirmatively reflects that Dahlstrom never advocated any of the items the Government attributes to Morris, Durst and Riply. Pet. at 7.

6. The Government's factual statements concerning the ALA membership affidavit, Pet. 8, are supported by Govt. Ex. 212. *See also* Govt. Ex. 148, 256. The Government, however, ignores the clear tenor of the document, as it clearly states: " . . . nor will I ever aid any Federal or State governmental unit, Bar Association, agencies employees, etc. in the bringing of any charges, lawsuits, civil or criminal, for damages, unauthorized law practice, contempt or otherwise . . ." Govt. Ex. 146.

Furthermore, the Government ignores the fact that the affidavit reflects the First Amendment right to association, *cf. N.A.A.C.P. v. Alabama*, 357 U.S. 449 at 459 (1958), and the history of the ALA. As stated above, *supra* at paragraph 2, Dahlstrom was concerned with potential criminal contempt charges for unauthorized practice of law and civil injunctive actions. The record reflects that in addition to the Missouri action, Dahl-

[10]The substantive counts of the indictment when compared to the tax returns relating to each substantive count of the indictment clearly reflect that the Government was not contesting the validity of the deduction in the initial instance. Rather, the Government took the position that the amount of the deduction in any given taxable year had to be reduced by the amount of any "gifts" also received in the same taxable year. Given that position, the Government should be estopped from taking a contrary posture.

strom encountered additional problems in Washington (civil injunction), Govt. Ex. 259, TR. 2086-93, 2212-20, 2824-26, and in Texas. TR. 2086-93, 2212-20. These problems occurred prior to the August 1979 IRS position paper and were unrelated to the federal income tax ramifications of the ALA program. Those problems were the seed which gave rise to the ALA membership affidavit; an affidavit created *prior* to the IRS position paper.

Thus, the Government's attempt to lay the ground work for its subsequent attempt to convince the Court that the affidavit was sinister and evil, Pet. at 10, is not appropriate under the First Amendment or in light of the affidavit in its entirety.

REASONS FOR DENYING THE WRIT

1. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTIONS PRESENTED IN THE GOVERNMENT'S PETITION

a. The two "Questions Presented" in the Government's petition, Pet. at (I), were not decided by the Court of Appeals. Moreover, the facts of record will not necessarily support a determination of the questions presented by this Court.

As stated by the Court of Appeals:

> "[t]he dispositive issue in this case is whether the evidence shows that appellants acted with the specific intent to violate section 7206(2). We have concluded, when viewed in the light most favorable to the government, that the evidence was insufficient to support a finding that appellants possessed a specific intent to violate section 7206 (2)." Pet. at 7a.

Even a cursory reading of the opinion below reveals that the Court considered and rejected three conten-

tions asserted by the Government as purportedly demonstrating specific intent: (1) the FTO's advocated by the ALA had no economic substance and were therefore blatant shams; (2) part IV of the ALA program (taxpayer's legal defense); and (3) statements made by Durst. Pet. at 7a.

As to the first contention, the Court of Appeals relied on a number of factors to reject the contention as proving respondents' specific intent: (a) there was no prior case law which would have put respondents on notice that in the context of FTO's substance controls over legal form; (b) the Government's expert witness testified that the trusts created through implementation of the ALA program were valid legal entities; (c) *Zmuda v. Commission*, 79 T.C. No. 714 (1982) could not be relied upon to give Respondents actual notice, even if applicable, because it was not decided until after respondents' trial; (d) the evidence at trial reflected that *even at that time*, the use of FTO's to save taxes was still a highly debatable issue and the IRS position paper issued in August 1979 postdated the material allegations of the indictment; and, (e) even assuming that respondents were negligent in continuing the ALA program after the dates of the IRS position paper, negligence did not amount to specific intent. Pet. at 7a-9a.

Based on the above five factors, the Court concluded that the legality of the ALA program "was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment." Pet. at 9a. Thus, the Government's contention regarding substance versus form[11] was not sufficient to prove the requisite intent

[11]The Court of Appeals necessarily, although *impliedly*, held that: (1) substance does not always control over legal form; (2) the evidence failed to prove that the respondents did not know that substance always controls over legal form; or, (3) the evidence failed to prove that the respondents did not, in good faith, believe in the legality of the ALA program. In light of a subsequent

to violate the tax laws as to Counts II through VI. Pet. at 11a.

As to the Government's second contention, the Court noted that the Government "concedes . . . that the actions recommended in the taxpayer defense program were not unlawful (Gr. Br. p. 27)." Pet. at 9a. Accordingly, the Court could not conclude that "advocacy of various lawful actions [FOIA requests, questions authorized by the Privacy Act and reliance on the Fifth and Sixth Amendments, among other items] translates into proof that the appellants were aware of the illegality of their tax shelter program." Pet. at 9a-10a (explanation added).

The Court went on to note that even if the respondents knew that they were advocating illegality, the First Amendment would require a further inquiry before their advocacy could be made criminal. Pet. at 10a. According to the Court, the two prong test of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), would have to be satisfied and nothing in the record indicated let alone proved that the respondents' advocacy contemplated imminent lawless action.[12]

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opinion of the Ninth Circuit, *Stewart v. C.I.R.*, 714 F.2d 977 at 987-988 (9th Cir. 1983), it appears that in the Ninth Circuit there are circumstances when form and form alone determines the tax consequences of a transaction. *Id.* at 988.

[12]This portion of the opinion - labeled an alternative holding by the Government, Pet. at 23 n.20 - is not necessary to the Court's holding that the evidence was insufficient to prove specific intent. At best, it is an alternative holding to the effect that the evidence was insufficient to show that the respondents' speech was not protected by the First Amendment.

It should be noted that the opinion makes no mention of the reason(s) why "nothing in the record indicates that the advocacy practiced by these defendants contemplated *imminent* lawless action." Pet. at 10a. The Government, however, has affirmatively stated that the Court held that the ALA program was protected by the First Amendment" . . . because the actual filing of the

Thus, even disregarding the First Amendment, the Government's contention regarding the taxpayer's legal defense portion of the ALA was insufficient to prove the requisite intent as to counts II through VI.

As to the Government's third contention, the Court held that Durst's statements were admissible solely against Durst and not against the other co-defendants. Pet. at 10a-11a. Thus, Durst's statements did not prove the requisite intent as to counts II through VI.[13]

b. Given the foregoing, it is clear that the Government's first "Question Presented" was not decided by the Court below. The language of the opinion itself ("unsettled by any clearly relevant precedent" Pet. at 9a) directly contradicts the Government's language (precedent "directly establishing" Pet. at (I)).

Also, the Government has assumed that the language employed by the Court ("any clearly relevant precedent", Pet. at 9a) is the legal equivalent of "a prior statute, regulation, or court decision." Pet. at (I). The Government's assumption in this regard is far too restrictive in light of the factors which the Court determined did not prove respondents' specific intent. For instance, among the factors the Court considered was the trial testimony of the Government's expert witness (Krogue), to the effect that FTO's were valid legal entities, Pet. at 8a, and the trial testimony of the IRS Re-

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fraudulent returns was not 'imminent' at the time respondents counseled such action." Pet. at 8.

The Government has *created* a reason to explain why the Court held that the evidence was insufficient to prove that the respondents contemplated imminent lawless action. *See* text *infra*.

[13]The Government does not seek review of the reversal on count VII. Pet. at 8 n.8.

With regard to count I, the Government does seek review. Pet. at 22-23 n. 19. In so doing, the Government has impliedly conceded that their "Questions Presented" *are not raised* because the Court reversed on insufficient evidence.

gional Counsel (Hallett), to the effect that use of FTO's to save taxes was still highly debatable as of the time of trial. Pet. at 8a. The fact that the Court considered these two factors in connection with its holding that the legality of the ALA plan was "completely unsettled by any clearly relevant precedent", Pet. at 9a, is sufficient to demonstrate that the government has assumed too much and interpreted the opinion below too narrowly.

Furthermore, the Court's language relating to any clearly relevant precedent was an implicit rejection of the substance versus form argument proffered by the Government.[14] It was also an implicit acknowledgment of the evidentiary insufficiency relating to specific intent: The Government simply failed to muster sufficient evidence that respondents voluntarily and intentionally violated a known legal duty.

c. With regard to the second "Question Presented" by the Petition, Pet. at (I), there can be no question that the Court did not state *why* the respondents' advocacy was not imminent. The Government's assertion (contained in the second "Question Presented") is not supported by the Court's opinion.

Although the Government's assertion that the time lapse between the date of the advocacy and the date that the tax returns in question were filed *could be one* reason the Court held that the record did not *indicate*, let alone prove, that the respondents contemplated imminent lawless action, that assertion is mere *speculation* by the Government. As such, it does not raise a concrete factual issue which this Court should endeavor to decide.

Furthermore, the record will not support a determination of the Government's second question presented. In *Brandenburg v. Ohio*, *supra*, this Court established

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[14]See note 11, *supra*.

a two prong test to the effect that advocacy of law violation cannot be proscribed except " . . . where such advocacy is directed to inciting or producting imminent lawless action *and* is likely to incite or produce such action." 395 U.S. at 447 (emphasis added).

Thus, the Court *may* have impliedly held that the evidence did not satisfy either the first or second prongs of *Brandenburg*. In other words, the Court may have held with respect to the first prong that the respondents' speech did not advocate illegal acts or even if it did, that the advocacy was not a direct incitement to immediate lawlessness. Furthermore, with respect to the second prong, the Court may have held that no imminence was present because Dahlstrom and other respondents encouraged ALA members and seminar attendees to seek further advice from their own accountants and/or lawyers and/or perform independent research into the tax ramifications. TR. 727-28, 743, 979-84, 989, 1036, 1047, 1600, 1609, 1721, 1824-25, 1925. Or, of course, the Court may have held that neither prong was satisfied because as to each substantive count, the individual taxpayers and corporate representatives testified that none of the respondents knew the contents of the tax returns or had any direct, personal involvement with the preparation of the tax returns.[18] Indeed, there were numerous witnesses at trial who testified that they consulted with independent accountants or attorneys and either utilized or did not utilize the ALA program according to the advice they received from those independent accountants and attorneys. TR. 491, 510-13, 523-26, 614-23, 979-84,

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[18]It must be remembered that the Government attempted to prove that *but for* the respondents' advocacy, the FTO's would not have been utilized and deductions asociated therewith would not have been utilized, *not* that the respondents (except as to Durst as to count VII) had actual knowledge and personal involvement with the preparation and presentation of the tax returns.

995, 1047-50, 1609-10, 1822, 2420-30, 3658-61. Similarly, there were witnesses at trial who testified that they utilized the ALA plan and that their independent accountants eventually prepared their tax returns utilizing deductions obtained from utilization of FTO's. TR. 515-16, 1155, 1238, 1721, 1945-53.[16]

The point is that the record does not necessarily support a determination of the Government's second question presented due to the existence of numerous other reasons (firmly supported by the record) upon which the Court might have based its conclusion regarding the First Amendment.

2. EVEN IF THE GOVERNMENT'S "QUESTIONS PRESENTED" ARE RAISED BY THE OPINION BELOW, THE OPINION BELOW IS CORRECT

Assuming, *arguendo*, that Dahlstrom has failed to adequately demonstrate that the Government's "questions presented" are not raised by the opinion below, this Court should not exercise its certiorari jurisdiction due to the correctness of that opinion. *Cf. Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974).

As reflected above in Dahlstrom's initial reason for denying the writ, the Court of Appeals held that the evidence viewed in the light most favorable to the Government failed to prove beyond a reasonable doubt that the respondents possessed the requisite intent to violate the tax laws. As to Dahlstrom, this holding is unassailable for the following reasons.

a. Contrary to the Government's assertions, Pet. at 9-10, Dahlstrom: (1) never advocated use of "copy not" pens;[17] (2) never advocated the use of, provided or

[16]As to counts II, III, IV, and VI, the tax returns were prepared by the taxpayers accountant. TR. 1036-39, 1122-23, 1155, 1238, 1610, 1953, 2137-38, 2192-93.

[17]Dahlstrom testified that for a six month period of time (which coincided with the attempts of the IRS to obtain the names of ALA

utilized false social security numbers for any purpose; (3) never advocated the use of, provided or utilized fictitious names for bank accounts; and, (4) never advised that disclosure of books and records to the IRS *could* (not *would*, as the Government suggests, Pet. at 10) lead to problems with the IRS, let alone criminal prosecution. *Cf.* Pet. at 15a (Goodwin, J., dissenting). *See also* note 18, *infra*. Dahlstrom did draft and use a membership affidavit. However, as explained above in section 3(b)(6) of the STATEMENT, the Government's effort to characterize that affidavit as indicative of guilty knowledge is without merit, ignores the facts of record, and attempts to utilize an exercise of First Amendment rights to Dahlstrom's detriment.

b. Contrary to the Government's assertions, Pet. at 9, there is substantial doubt regarding the legality of the ALA program in light of the facts of record regarding the legality of the FTO's and the controversy regarding the substance over form doctrine. The ultimate resolution of the tax consequences of FTO's and deductions generated as a result of utilization of FTO's will necessarily have to be decided on a case by case basis, as explained above in sections 3(b) (1-4) of the STATEMENT. However, even if the ultimate resolution of the ALA program was now decided to be illegal *and* that it was illegal during the period alleged in the indictment, that resolution would not render the opinion below incorrect as to Dahlstrom due to the uncontroverted evidence of Dahlstrom's lack of specific intent and good faith.

c. The trial evidence reflects that Dahlstrom advocated following the law, that he believed, after much legal research into specific cases emanating from this

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members) he personally used a blue "copy not" pen to protect ALA members names. Dahlstom specifically testified this was an effort to maintain privacy and uphold the First Amendment right to association. TR. 3333-36, 3519.

Court and other Courts, that the law authorized the ALA plan, that exacting documentation had to be maintained as to each transaction to avoid bare form, and that he encouraged seminar attendees to tape record his seminars for their own accountants and lawyers to review along with the written materials he provided. He solicited and received the views of accountants and attorneys regarding the ALA plan, some of whom approved the plan and some of whom disagreed with the tax consequences Dahlstrom felt would legally ensue from the plan.[18] The printed materials Dahlstrom provided contained not only portions of court cases, but also excerpts from the IRS Service Manual; portions of which expressly authorized actions he himself had taken but which the Government attempted to characterize as obstructive and indicative of guilty knowledge.[19]

The Government's evidence regarding Dahlstrom's specific intent was so weak that the Government was forced to resort to the Missouri and Washington[20] civil

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[18]It should be noted that none of the attorneys or accountants who ever disagreed with Dahlstrom (including the IRS Regional Counsel) even mentioned the *possibility* of criminal prosecution or liability. Indeed, the record firmly supports the conclusion that the Government prosecuted Dahlstom due to his advocacy of the taxpayer's legal defense program, due to his refusal to accept the IRS position paper, and due to his sixteen page response to that position paper. *See* note 6, *supra*. *Only through criminal prosecution could the IRS attempt to stop Dahlstrom from educating people of their legal rights vis-a-vis the IRS and from advocating the position that economic substance does not always control over legal form.*

[19]For instance, Dahlstom advocated utilization of a tape recorder during IRS audits to protect the record. This was expressly addressed in the IRS manual. Govt. Ex. 146 at p. 63.

[20]Govt. Ex. 259, the Washington injunction, did not address any federal tax aspects of the ALA seminars. Similarly, the Missouri injunction did not address any Federal tax aspects *and* occurred more than two years before Dahlstrom began his advocacy of the ALA program relating to FTO's.

actions, Govt. Ex. 62 and 259, to try to show that Dahlstrom: (1) had violated the state laws which gave rise to the state civil injunctions; (2) had knowledge in 1977 (by virtue of the Washington injunction) that the program he was then advocating was illegal; and, (3) had ignored the Washington injunction, thereby violating a court order, and that this conduct was similar to Dahlstrom's alleged intentional disregard of the opinions of various people who had expressed some disagreement with the tax ramifications of the ALA program. Five separate times during the Government's case - twice during cross-examination, TR. 3546-48, 3638, and three times during final argument, TR. 4126, 4136, 4318-20 - the Government used the Washington injunction against Dahlstrom in an effort to convince the jury to conclude that since Dahlstrom may have had the intent to violate a state court injunction[21] he necessarily had the intent to violate the federal tax laws.

Similarly, the Government's evidence regarding Dahlstrom's specific intent was so weak that it had to utilize Dahlstrom's exercise and advocacy of First Amendment rights against him. Thus, Dahlstrom's personal utilization of FOIA and Privacy Act rights was used against him. Thus, Dahlstrom's advocacy of the propriety of using those same statutory rights as well as certain rights protected by the Fifth and Sixth Amendment was used against him.

Indeed, the Government's evidence as to Dahlstrom's specific intent was so weak that they were forced to and did successfully challenge over fifty documents (including letters, court opinions, etc.) that Dahlstrom

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[21]The Government conceded in its brief to the Ninth Circuit that the "acts described in the injunction are not patently unlawful . . ." Govt. Br. at 54-55. Thus, the Government went to extremes in urging the jury to conclude that a man who perhaps ignored a state court order to refrain from doing acts not patently unlawful would, with criminal intent, violate federal tax laws.

attempted to introduce to show his state of mind as to how and why he devised and justified the ALA program. Also, the Government also successfully challenged the single most accurate evidence of Dahlstrom's specific intent: videotapes and tape recordings of seminars[22] given by Dahlstrom long before he even became aware of the IRS position regarding his program.

In essence, the Government did everything it could to keep probative evidence of Dahlstom's actual intent and good faith from the jury. That action was compounded by the trial court's denial of defensive instructions on good faith reliance on counsel, reliance on case law, and properly drafted instructions on substance versus form.

In light of the Government's utilization of Dahlstrom's First Amendment rights and the fact that none of *Dahlstrom's* own acts and statements indicate a specific intent to violate the statutes involved herein, the doctrine of *strictissimi juris* is entirely appropriate and even warranted. *See Scales v. United States*, 367 U.S. 203, 231 (1961), *Noto v. United States*, 367 U.S. 248, 299-300 (1961). The doctrine, which literally translated means "of the highest right", arose in the above cited cases in this Court. In *Noto*, *supra*, this Court held that the individual defendant's criminal intent "must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes because of other and unprotected purposes which he does not necessarily share." Similarly, in *Scales*, *supra* at 232, this Court held that the case called for "strict standards in assessing the adequacy of

[22]These tapes consisted of both types of seminars: the general two-day, four part ALA seminar and the informal CPA/Attorney seminar.

the proof necessary to make out a case of illegal advocacy." Application of this doctrine in the present case reveals that the Court of Appeals reached the correct result.

Moreover, even if the doctrine is not applicable, the Government's course of conduct at trial, coupled with the lack of evidence of Dahlstrom's specific intent and the overwhelming evidence of Dahlstorm's good faith, demonstrates the correctness of the opinion below.[23]

3. EVEN IF THE OPINION BELOW IS NOT CORRECT, THE RESPONDENTS' CONVICTIONS MUST BE REVERSED

Regardless of this Court's disposition of the Government's "Questions Presented", Dahlstrom's conviction on all counts must be reversed due to the Government's use of Dahlstrom's First Amendment rights to prove his alleged specific intent.

Count I of the indictment alleged, as one of the manner and means of the conspiracy, that the respondents attempted to impair and impede the IRS through their advocacy of the taxpayer legal defense portion of the ALA program.[24] At trial, the Government elicited testimony pertaining thereto in an effort to prove Dahlstrom's specific intent. Dahlstrom's personal utilization of statutory rights under the FOIA and Privacy Act was also elicited by the Government.

Dahlstrom's personal invocation of those statutorily protected rights falls well within the sphere of conduct protected by the First Amendment. *Cf. United States v. Hylton*, 710 F.2d 1106, 1111 (5th Cir. 1983). Also, Dahlstrom's advocacy of the propriety of reliance on those

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[23]These factors also demonstrate that the Government's statements regarding respondents' knowledge of the illegality of the program, Pet. at 9, 10, are entirely fallacious as to Dahlstrom.

[24]A copy of the indictment was also attached to the court's instructions to the jury. Cr. 341.

statutorily protected rights as well as rights encompassed within the Fifth and Sixth Amendments is likewise within the scope of First Amendment protection. *Brandenburg v. Ohio, supra.*

In light of the Government's utilization of Dahlstrom's First Amendment rights as substantive evidence of his alleged specific intent and the realization that the jury, in reaching a general verdict, was given no limiting instruction with regard to their consideration of that evidence, Dahlstrom's conviction must be reversed under this Court's opinions in *Street v. New York*, 394 U.S. 576 (1969) and *Gregory v. Chicago*, 394 U.S. 111 (1969).

4. THE OPINION BELOW ADDRESSED ONLY THE EVIDENTIARY INSUFFICIENCY OF RESPONDENTS' SPECIFIC INTENT

a. As demonstrated in Dahlstom's initial reason for denying the writ, the Court of Appeals decided only one issue: the sufficiency of the evidence of respondents' specific intent. As such, the Government seeks this Court to review the sufficiency of the evidence, notwithstanding its efforts to create "Questions Presented" which were not decided by the Court below.

In *Scales v. United States*, 367 U.S. 203, 230 (1960), this Court stated:

> "Only in rare instances will this Court review the general sufficiency of the evidence to support a criminal conviction, for ordinarily that is a function which properly belongs to and ends with the Court of Appeals."

See also United States v. Johnson, 268 U.S. 220, 227 (1925) where the Court stated that "[w]e do not grant a certiorari to review evidence and discuss specific facts".

Furthermore, under *Burks v. United States*, 437 U.S. 1 (1978), there is a serious question of whether this Court can review the Court of Appeals decision without violating the Double Jeopardy Clause of the Fifth

Amendment.[25]

b. The trial testimony in this cause is over 3800 pages. The trial clerk's record contains over 350 multipage documents. Hundreds of documents were introduced at trial. Obviously, a review of the sufficiency of the evidence would consume a vast amount of judicial resources.

c. The Government's petition is essentially a restatement of the position it took in its motion for rehearing en banc before the Ninth Circuit. Neither the panel which delivered the opinion below nor any judge of the Ninth Circuit voted to grant the Government's motion for rehearing.

5. THE GOVERNMENT'S FIRST REASON FOR GRANTING THE PETITION IS WITHOUT MERIT

Dahlstrom asserts that the Government's first reason for granting the petition, Pet. at 9-22, is without merit. Promoters of unlawful tax shelter schemes do not form voluntary membership associations. They do not construct 7200 square foot educational facilities containing tax law libraries with over 5000 volumes and computer research facilities. They do not encourage seminar attendees to tape record everything they say. They do not video tape and tape record themselves for anyone to watch or listen to. They do not advise their clients to seek the advice of independent lawyers and accountants and/or to perform additional independent legal research. They do not prepare sixteen page legal responses to IRS position papers. They do not prepare monthly newsletters for dissemination to

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[25]Dahlstrom recognizes that *Burks v. United States*, *supra*, does not affirmatively answer this issue. Dahlstom further recognizes that *Burks*, *supra* at 5 noted that "[t]he United States has not cross-petitioned for certiorari on the question of whether the Court of Appeals was correct in holding that the Government had failed to meet its burden of proof with respect to the claim of insanity."

the members of their organization concerning tax cases emanating from the Supreme Court and legislative actions pertinent to their programs. They do not hire staff attorneys to do tax research and issue legal opinions.

a. With respect to part a of the Government's first reason to grant the petition, Pet. at 10-15, the Court did not hold, contrary to the Government's assertion, "... that the absence of a statute, regulation, or court decision directly on point precludes prosecution ..." Pet. at 10-11. *See* Dahlstrom's initial reason for denying the writ, *supra*. As such, the Government's assertion regarding the Court's holding is nothing more than a strawman which the Government then destroys. The Court did not, contrary to the Government's suggestion, Pet. at 11-12, alter or modify the willfulness requirement of Section 7206 (2). Rather, the Court held that the evidence failed to show a voluntary intentional violation of a known legal duty, Pet. at 9a, because the factors relied upon by the Government (i.e., substance versus form, taxpayer legal defense and Durst's statements) did not prove beyond a reasonable doubt that the ALA program was fraudulent *or* that respondents knew that it was fraudulent, if it was.

Since the Government asserts that "[i]t should be sufficient to prove that the promoters' program was fraudulent and that the promoters recognized it was fraudulent,"[26] Pet. at 11, the Court below essentially used the standard espoused by the Government and

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[26]In light of the first prong of the standard the Government submits is correct, i.e., that the program was fraudulent, it is difficult to understand the Government's assertion that "[t]he issue is ... not the objective certainty or uncertainty of the law." Pet. at 12. Regardless, Dahlstrom's testimony and the trial record as a whole unequivocally reveals that Dahlstrom believed the law to be unsettled in the substance versus form area. No evidence adduced by the Government as to *Dahlstrom's* own acts or statements contradicts that belief.

held that neither prong of that standard was satisfied.

Furthermore, the Government's effort to chastise the Court below for invading the province of the jury, Pet. at 13-15, ignores the factors set forth above in Dahlstrom's second reason to deny the writ, to wit: (1) exclusion of defensive evidence; (2) improper jury charges; and, (3) improper evidence allegedly showing specific intent (i.e., First Amendment rights, civil injunctions etc.).

b. With respect to part b of the Government's first reason to grant the petition, Pet. at 15-19, there is no conflict between the opinion below and *Ingredient Technology Corp.*, 698 F.2d 88 (2nd Cir. 1983), for the reason, *inter alia*, that in the present case, the evidence clearly reflected Dahlstrom's knowledge of the complexity of the law. Dahlstrom's knowledge of the complexity of the tax laws (as evidenced by the ALA materials, the conflicting legal opinions he received during his advocacy of the ALA program, and his interchange of letters and case law with the IRS Regional Counsel) reveals the obvious fallacy of the Government's assertion that there was no evidence that respondents genuinely thought that their advocacy was lawful and that their conduct indicated a subjective belief in the unlawfulness of their program. Pet. at 15. Similarly, Dahlstrom's knowledge of the complexity of the tax laws and his testimony that despite the complexity he believed that the ALA program was legal justified the introduction of expert testimony as to whether his belief that the ALA plan was legal was a good faith belief. *Cf. United States v. Ciardy*, 612 F.2d 1139, 1153 (9th Cir. 1980), cited in *Ingredient Technology Corp.*, *supra* at 97.

Also, the Government's statement that *United States v. Critzer*, 498 F. 2d 1160 (4th Cir. 1974), has no application to the instant case because there was "no evidence that respondents relied on statements or posi-

tions of the government," Pet. at 16, belies the evidence. Dahlstrom testified and introduced documents that proved that he was audited for 1972. The IRS subsequently issued a deficiency assessment in the amount of $820.16 as to Dahlstrom's personal use of domestic business trust organizations for the tax year 1973. TR. 3029-32. He also testified that the only difference between domestic business trusts and FTO's was the domicile of the trust and that his interpretation of FTO's was based, in part, on his prior research into pure trust organizations. TR. 3210-22. Finally, he testified and introduced documents that the above deficiency was ultimately withdrawn by the IRS in 1978. TR. 3103-04, 3587-93. Thus, Dahlstrom did in fact rely on the IRS position (with regard to their tax treatment of his personal business trust organizations) when he continued to advocate the ALA program after 1978.[27]

Thus, since there was evidence of Dahlstrom's actual knowlege of the complexity of the tax laws, evidence of Dahlstrom's good faith belief in the legality of the ALA program and evidence of Dahlstrom's reliance on the IRS, the Government's attempt to create a conflict is without merit.

c. With regard to part c of the Government's first reason for granting the petition, Pet. at 19-22, the Government has reiterated its substance over form argument. It is sufficient for purposes of this response to

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[27]It should also be noted that as of the time of trial over twenty tax court cases were pending regarding deductions generated pursuant to the utilization of FTO's. TR. 3757, 3929. As to those cases, the IRS had been inconsistent, seeking a negligence penalty as to some and a civil fraud penalty as to others. TR. 3929-30. Yet, in no case prior to the instant indictment had the Government initiated a criminal fraud prosecution.

Similarly, the Government did not prosecute Dahlstrom for his personal use of FTO's. Rather, in 1983 the IRS proceeded against Dahlstrom in Tax Court for deficiencies due to his personal use of FTO's.

note that the ultimate resolution of this issue does not negate the evidence that Dahlstrom, based on his legal research, believed in good faith that there is no absolute rule of substance over form.

6. THE GOVERNMENT'S SECOND REASON FOR GRANTING THE PETITION IS WITHOUT MERIT

The Government's second reason for granting the petition, Pet. at 23-30, relates to the Government's second "Question Presented". Pet. at (I). Since the second question is not raised by the opinion below and necessarily depends on an assumption not contained in the opinion below (*see* note 12, *supra*, and part c of Dahlstrom's initial reason for denying the writ), Dahlstrom's response will be very limited.

a. With regard to part a, Pet. at 23-26, the most important point is that the Government is advocating *strict liability* for an unlimited period of time after a speaker's advocacy. Unless the substantive topic of a speaker's advocacy is going to control the extent of First Amendment protection, the Government's position must be rejected. Even if the substantive topic is going to control, the First Amendment allows a speaker to advocate *known* law violations unless additional factors are present. *Brandenburg v. Ohio*, *supra*. The Government's posture, in a nutshell, is repugnant to the origins of the First Amendment.

b. As to part b, Pet. at 27-28, the Government has not and can not cite any precedent that holds that Dahlstrom's advocacy to ALA members and potential members is commercial speech, for clearly it is not commercial speech. *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).

c. As to part c, Pet. at 28-30, the new IRS regulations relating to abusive tax shelters and promoters thereof (promulgated by the IRS since the opinion below was delivered) will eliminate all of the problems the Government *imagines* the opinion below will gen-

erate. *See* Rev. Proc. 83-78, Sections 1-8. Indeed, those regulations provide, *inter alia*, for notice by the IRS to promoters of the tax shelter program of the IRS position, an opportunity for the promoter to respond thereto, and devices for the IRS to prevent the continuation of the promotion of an abusive tax shelter. Although the Government has noted the 1982 legislation under which these regulations were promulgated, Pet. at 29 n. 24, the Government has failed to even mention Rev. Proc. 83-78.

Even a cursory review of Rev. Proc. 83-78 reveals that it renders moot the ramifications that the Government asserts the opinion below will generate.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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April 10, 1984